

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DEBORAH FRAME-WILSON, CHRISTIAN  
SABOL, SAMANTHIA RUSSELL, ARTHUR  
SCHAREIN, LIONEL KEROS, NATHAN  
CHANEY, CHRIS GULLEY, SHERYL  
TAYLOR-HOLLY, ANTHONY COURTNEY,  
DAVE WESTROPE, STACY DUTILL,  
SARAH ARRINGTON, MARY ELLIOT,  
HEATHER GEESEY, STEVE MORTILLARO,  
CHAUNDA LEWIS, ADRIAN HENNEN,  
GLENDA R. HILL, GAIL MURPHY,  
PHYLLIS HUSTER, and GERRY  
KOCHENDORFER, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware corporation,  
Defendant.

Case No. 2:20-cv-00424-RAJ  
ORDER

**I. INTRODUCTION**

This matter comes before the Court on Defendant Amazon's Motion to Dismiss the Second Amended Complaint ("SAC"). Dkt. # 59. Plaintiffs oppose the motion to dismiss. Dkt. # 61. Having reviewed the briefing, including the parties' supplemental

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authorities (Dkt. ## 64, 66), the remaining record, and relevant law, the Court finds that oral argument is unnecessary. For the reasons below, the motion to dismiss is **DENIED in part** and **GRANTED in part**.

## II. BACKGROUND

The general facts of this case have been recounted in this Court's prior order, and the Court will not reiterate them here. *See* Dkt. # 48 (prior Order outlining the facts of the case). Previously, the Court denied in part and granted in part Amazon's motion to dismiss the First Amended Complaint ("FAC"). Dkt. # 48. Specifically, the Court dismissed Plaintiffs' 15 U.S.C. § 1 ("Section 1") *per se* claim; state antitrust, restraint of trade, and consumer protection claims; and unjust enrichment claims. *Id.* The Court granted Plaintiffs leave to amend their complaint, and Plaintiffs filed the SAC. *See* Dkt. #55.

The SAC again includes claims for a *per se* Section 1 violation (First Cause of Action), a non-*per se* Section 1 violation (Second Cause of Action), a 15 U.S.C. § 2 ("Section 2") monopolization violation (Third Cause of Action), a Section 2 attempted monopolization violation (Fourth Cause of Action), a Section 2 conspiracy to monopolize violation (Fifth Cause of Action), and a California Cartwright Act *per se* violation (Sixth Cause of Action). Dkt. # 55, ¶¶ 224-284.

Amazon now moves to dismiss the SAC with prejudice for lack of antitrust standing and failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. # 59. Amazon argues: (1) that Plaintiffs lack standing for reasons the Court did not reach in its prior Order, (2) new allegations concerning Amazon's Fair Pricing Policy contract the Policy's plain language, (3) the SAC fails to allege market power or anticompetitive effects, and (4) the SAC's Section 1 and Cartwright Act allegations fail as they did previously. *Id.* at 7-9.

## III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint

for failure to state a claim. The court must assume the truth of the complaint’s factual allegations and credit all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court “need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Instead, the plaintiff must point to factual allegations that “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). The complaint avoids dismissal if there is “any set of facts consistent with the allegations in the complaint” that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

#### IV. DISCUSSION

Amazon moves to dismiss Plaintiffs’ SAC, alleging various grounds for dismissal: Amazon argues: (1) that Plaintiffs lack standing for reasons the Court did not reach in its prior Order, (2) new allegations concerning Amazon’s Fair Pricing Policy contract the Policy’s plain language, (3) the SAC fails to allege market power or anticompetitive effects, and (4) the SAC’s Section 1 and Cartwright Act allegations fail as they did previously. *Id.* at 7-9.

##### A. Standing

###### 1.) Co-Conspirator Standing

In ruling on Amazon’s motion to dismiss the FAC, this Court held that Plaintiffs established standing based on their allegation that they were direct purchasers of antitrust conspirators. Dkt. #48 at 8. This Court found that Plaintiffs’ allegation that “they overpaid as a result of the alleged price-fixing conspiracy when they purchased class products from Amazon’s co-conspirators on platforms other than Amazon.com” was sufficient for antitrust standing, because the Ninth Circuit has held that “[w]hen co-conspirators have jointly committed the antitrust violation, a plaintiff who is the

1 immediate purchaser from any of the conspirators is directly injured by the violation.” *Id.*  
2 (citing *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 113, 1157  
3 (9th Cir. 2019)).

4 The Court further found that there was no need to apply an umbrella theory, which  
5 posits that non-conspirators’ prices for class products are artificially inflated due to the  
6 “umbrella” of non-competitive market conditions created by Amazon’s arrangements  
7 with co-conspirators, to the parties’ arguments. Dkt. # 19 at 15-16; Dkt. # 48 at 6-8; *see*  
8 *also In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 691 F.2d  
9 1335, 1338-39 (9th Cir. 1982).

10 Amazon again challenges Plaintiffs’ standing, arguing that Plaintiffs have failed to  
11 establish it under the co-conspirator exception to *Illinois Brick Co. v. Illinois*, 431 U.S.  
12 720 (1977), on grounds that the Court did not reach. Plaintiffs note that Amazon’s prior  
13 challenge to Plaintiffs’ standing was resolved in Plaintiffs’ favor, and the arguments now  
14 raised by Amazon could have been raised in the first round of briefing, if they weren’t  
15 already raised. Indeed, Amazon sought reconsideration of this Court’s prior Order  
16 denying in part and granting in part dismissal, and again urged this Court to apply an  
17 umbrella analysis to Plaintiffs’ standing argument. *See* Dkt. # 51. Essentially, Plaintiffs  
18 oppose Amazon using the same raised arguments to take a second bite at the dismissal  
19 apple.

20 Although Amazon claims that their current arguments against Plaintiffs’ standing  
21 are based on amendments to the SAC, Plaintiffs’ core allegations remain consistent.  
22 Given that the Court has previously ruled that Plaintiffs have standing (and found it  
23 unnecessary to analyze standing as direct purchasers from alleged antitrust co-  
24 conspirators under an umbrella theory), the Court sees no need to revisit its ruling at this  
25 time. However, the Court will address several arguments raised by Amazon in its  
26 briefing.

27 2.) *Joinder of Alleged Co-Conspirators and Pass-On Theory of Damages*

1 Amazon argues that Plaintiffs must join third-party sellers and alleged co-  
2 conspirators as defendants. Dkt. # 59 at 1. Amazon claims that, to establish standing  
3 based on an alleged vertical conspiracy, “joinder of the alleged co-conspirators ‘is  
4 required to prevent a serious risk of multiple liability.’” *Id.* (citing *In re Coordinated*  
5 *Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1342  
6 (9th Cir. 1982). Plaintiffs factually distinguish *Petroleum Products* from the matter at  
7 hand, and the Court agrees that Plaintiffs need not join Amazon’s co-conspirators.

8 The plaintiffs in *Petroleum Products* derived standing from their gas purchases  
9 from alleged co-conspirators (retail dealers) who also directly purchased from defendant  
10 gas suppliers. 691 F.2d at 1341. The court required plaintiffs to join the retail dealers *if*  
11 they were to pursue a resale price maintenance conspiracy claim. *Id.* If plaintiffs pursued  
12 this claim, the retail dealers could later prove that they were not a part of the conspiracy  
13 and could then maintain their own suits as direct purchasers. *Id.* at 1342. The Court found  
14 there to be an unacceptable risk of duplicative recovery. *Id.* As this Court previously  
15 noted, here, “there is no chain of distribution or pass-through costs that create a risk of  
16 duplicative recovery” here. Dkt. # 48 at 8. However, even if third-party sellers were to  
17 pursue their own actions for lost profits, that would not foreclose Plaintiffs’ own action  
18 for overcharge injuries. *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677,  
19 688 (2d Cir. 2009).

20 Similarly, Amazon argues that Plaintiffs improperly rely on a pass-on theory of  
21 liability and relies on *In re ATM Antitrust Fee Litig.*, 686 F.3d 741, 755 (9th Cir. 2012).  
22 Amazon characterizes Plaintiffs’ claims thusly: “Plaintiffs’ claim they paid more than  
23 they otherwise would have paid because the former parity provision and the Fair Pricing  
24 Policy caused Amazon third-party sellers to pass on to consumers the fees they paid to  
25 Amazon, eliminating price competition among online retailers.” Dkt. # 59 at 11. Under  
26 *ATM*, Amazon argues, Plaintiffs’ allegations that “seller fees are *built into* the prices its  
27 sellers charge their customers for products purchased on Amazon Marketplace” are fatal.

1 *Id.* (quoting SAC ¶ 125) (italics in Dkt. # 59). “An allegation that ‘a cost paid by the  
 2 buyer is baked into the purchase price is simply another way of saying that the cost is  
 3 passed through to the buyer.’” Dkt. # 59 at 11 (quoting *Leeder v. Nat’l Ass’n of Realtors*,  
 4 2022 WL 13071400, at \*4 (N.D. Ill. May 2, 2022)). Plaintiffs argue that, for *ATM* to  
 5 apply, “Amazon and its third-party sellers would have to participate in a conspiracy to fix  
 6 seller fees that sellers would then pass onto Plaintiffs in a subsequent transaction between  
 7 Plaintiffs and the sellers. Plaintiffs have never alleged this.” Dkt. # 61 at 10. The Court  
 8 agrees. Notably, in *ATM*, the district court found plaintiffs to be indirect purchasers (and  
 9 therefore blocked by the *Illinois Brick* wall) because they did not directly pay the alleged  
 10 unlawful fee. 686 F.3d at 750. Here, on the other hand, Plaintiffs allege that they directly  
 11 purchase Class Products at inflated prices from co-conspirator sellers, conferring  
 12 standing. SAC ¶ 263, 274. Amazon’s argument fails.

### 13 3.) Section 2 Conspiracy to Monopolize Standing

14 Amazon attacks Plaintiffs’ standing to bring their new Section 2 conspiracy to  
 15 monopolize claim, arguing that Plaintiffs fail to allege facts to satisfy the required  
 16 elements. Dkt. # 59 at 7. A Section 2 conspiracy to monopolize claim is proven by: “(1)  
 17 the existence of a combination or conspiracy to monopolize; (2) an overt act in  
 18 furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal  
 19 antitrust injury.” *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th  
 20 Cir. 2003).

21 Amazon attacks Plaintiffs’ allegations in support of the third element and contends  
 22 that the SAC fails to allege that Amazon and its third-party sellers acted in concert with  
 23 “specific intent” to confer monopoly power on Amazon alone. Dkt. # 59 at 7. Instead,  
 24 Amazon argues, Plaintiffs allege a shared monopoly, which is not recognized in the Ninth  
 25 Circuit. *Id.* at 8. Plaintiffs argue that the sellers’ specific intent can be inferred from the  
 26 character of the actions taken, which includes the various MFN agreements. Dkt. # 61 at  
 27 5. Additionally, Plaintiffs’ note that they do not allege the existence of a shared

1 monopoly, but instead describe a monopoly in which many of the alleged co-conspirators  
2 participate “reluctantly”. SAC ¶ 35.

3 The Court agrees. “The involuntary nature of one’s participation in a conspiracy to  
4 monopolize is no defense. An antitrust conspirator can be held liable for damages even  
5 though he participates only under coercion.” *Calnetics Corp. v. Volkswagen of America,*  
6 *Inc.*, 532 F.2d 674, 682 (9th Cir. 1976). Given the undeveloped factual record, the Court  
7 at this point cannot say whether the agreements between Amazon and third-party sellers  
8 “are not so anticompetitive on their face that they can be condemned without ... evidence  
9 that they were adopted with specific intent to monopolize.” *Freeman v. San Diego Ass’n*  
10 *of Realtors*, 322 F.3d 1133, 1155 (9th Cir. 2003). However, taking the allegations in the  
11 SAC as true and making all inferences in the light most favorable to Plaintiffs, as the  
12 Court must at this stage, the Court finds that Plaintiffs have adequately alleged that the  
13 agreements at issue here “were designed to maintain market power, which is sufficient to  
14 allege defendants’ specific intent.” *In re National Football League’s Sunday Ticket*  
15 *Antitrust Litig.*, 933 F.3d 1136, 1159 (9th Cir. 2019); SAC ¶¶ 17-18, 36, 156-58, 163-64,  
16 201, 251, 269.

#### 17 4.) Article III Standing

18 Amazon argues that Plaintiffs have not alleged requisite facts to establish Article  
19 III standing based on purchases by absent class members from sellers *other* than alleged  
20 co-conspirator sellers from whom Plaintiffs made purchases. Dkt. # 59 at 15. According  
21 to Plaintiffs, Amazon conflates standing and class certification. Dkt. # 61 at 13. The  
22 Court agrees.

23 To establish Article III standing, a plaintiff must show that “(1) the plaintiff  
24 suffered an injury in fact, i.e., one that is sufficiently concrete and particularized and  
25 actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the  
26 challenged conduct, and (3) the injury is likely to be redressed by a favorable decision.”  
27 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011). “Standing exists if at

1 least one named plaintiff meets the requirements.” *Id.* Amazon’s argument raises the  
2 issue of whether named plaintiffs are adequate representatives of the claims of unnamed  
3 plaintiffs—a question for class certification, to be addressed at a later time. *Melendres v.*  
4 *Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015).

5 For the reasons stated above, this Court finds that Plaintiffs’ suit should not be  
6 dismissed for lack of standing. Amazon’s request is **DENIED**.

7  
8 **B. Section 1 *Per Se* Claim**

9 Previously, this Court dismissed Plaintiffs’ Section 1 *per se* claim, noting that  
10 Plaintiffs were not challenging Amazon’s conduct as a competitor to third-party sellers,  
11 but instead challenge the vertical agreement between third-party sellers and Amazon.com  
12 as their host platform. Dkt. # 48 at 11-12. Plaintiffs did not allege in their First Amended  
13 Complaint that the provisions at issue involved agreement to fix prices of Amazon’s  
14 products *and* those of third-party sellers. *Id.* However, this Court noted that, even if the  
15 agreements between Amazon and third-party sellers were found to also contain a  
16 horizontal element, they would be analyzed under the rule of reason—not a *per se*  
17 framework. *Id.* (citing *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 (9th Cir.  
18 1986))

19 Plaintiffs argue that the SAC “demonstrates that the MFN agreements are  
20 agreements between competitors to increase their prices across online retail sales.” SAC  
21 ¶¶ 2, 29. In support of Plaintiffs’ revived *per se* Section 1 claim, the SAC includes  
22 findings from the House subcommittee on antitrust and German competition authorities  
23 that third-party sellers are both Amazon’s customers and competitors. *Id.* ¶ 94. It further  
24 alleges that German regulators have characterized the prior Price Parity Provision as a  
25 “horizontal price-fixing” agreement with stark anticompetitive effects. *Id.* ¶ 112-113.

26 Amazon, on the other hand, argues that Plaintiffs’ Section 1 *per se* claims again  
27 fail and asserts that “[n]o court has ever found that policies directed at promoting

1 competitive *consumer* prices, like the former parity provision and the Fair Pricing Policy,  
2 are an antitrust violation at all, let alone a *per se* violation.” Dkt. # 59 at 17. Because of  
3 this, Amazon argues, the rule of reason applies instead. *Id.* at 19.

4 “Some types of restraints...have such predictable and pernicious anticompetitive  
5 effect, and such limited potential for procompetitive benefit, that they are deemed  
6 unlawful *per se*.” *State Oil v. Khan*, 522 U.S. 3, 10 (1997). The Supreme Court has  
7 cautioned that “the *per se* approach is not to be readily expanded to new arrangements or  
8 to business relationships with which the courts are inexperienced.” *American Ad Mgmt.,*  
9 *Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996) (citations omitted).

10 Plaintiffs rely on *Palmer v. BRG of Georgia, Inc.* in support of their contention  
11 that Amazon’s MFN agreements are *per se* illegal. 498 U.S. 46 (1990). *Palmer* involved  
12 an agreement between companies that previously competed in a particular geographic  
13 market before they allocated territories and agreed not to compete in each other’s  
14 territories. *Id.* at 49. This is an example of market allocation, and not analogous to the  
15 facts before us, which are considerably more complex. Notably, the *Palmer* Court found  
16 significant the immediate and substantial price increase that one of the companies  
17 instituted after coming to their illegal agreement. *Id.* at 47. This price increase ended up  
18 benefitting both parties to the agreement. *Id.* No such agreement (or benefit to both third-  
19 party sellers and Amazon) is alleged here. Similarly, *Aya Healthcare Serv., Inc. v. AMN*  
20 *Healthcare, Inc.*, also cited by Plaintiffs, involved an *undisputed* horizontal restraint that  
21 was ultimately found to be “ancillary to the parties’ broader agreement,” and therefore  
22 subject to a rule of reason analysis. 9 F.4th 1102, 1111 (9th Cir. 2021). Ancillary  
23 restraints must be “(1) subordinate and collateral to a separate, legitimate transaction”  
24 and “(2) reasonably necessary to achieving that transaction’s pro-competitive purpose,”  
25 and Plaintiffs do not allege that the allegedly anticompetitive aspects of the MFNs are  
26 “ancillary” to the co-conspirators’ agreements. *Id.* at 1109 (citations and quotations  
27 omitted). *Aya*’s applicability to the facts at hand is limited.

1 Ultimately, the SAC still does not present facts “supporting a horizontal  
2 agreement, a ‘meeting of the minds,’ or conspiracy between” third-party sellers who  
3 entered an MFN that would lead to *per se* liability. Dkt. # 48 at 13 (citing *Twombly*, 550  
4 U.S. at 557). This cause of action is dismissed. Amazon’s motion to dismiss this claim is  
5 **GRANTED**.

### 6 **C. Section 2 Monopolization Claims**

7 Amazon moves to dismiss Plaintiffs’ Section 2 claims on the basis that the plain  
8 language of the “Fair Pricing Policy” does not require “third-party sellers to add  
9 Amazon’s fees and costs to their products when they sell them off Amazon in other  
10 online stores.” Dkt. # 59 at 19<sup>1</sup>. The policy prohibits sellers from “[s]etting a price on a  
11 product or service that is significantly higher than recent prices offered on or off  
12 Amazon.” SAC ¶ 16; Dkt. # 60, Ex. B. Amazon argues that the policy “protects  
13 consumers,” is not an MFN, and only prohibits price gouging—something that is  
14 prohibited by many states. Dkt. # 59 at 19-20. Ultimately, Amazon argues, the policy is  
15 not anticompetitive.

16 Plaintiffs maintain that the “Fair Pricing Policy” is simply a whitewashed version  
17 of the prior Price Parity requirement, and that the policy threatens sellers who sell their  
18 products for a higher price on Amazon with consequences such as “removing the product  
19 from the Buy Box, suspending shipping options, and terminating selling privileges.” SAC  
20 ¶ 129.

21 The SAC contains various allegations that the policy is administered as an  
22 anticompetitive MFN and forces third-party sellers to maintain price parity across their  
23 online platforms even when they could offer lower prices on sales channels outside of  
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25  
26 <sup>1</sup> Amazon submits a copy of the Fair Pricing Policy, *see* Dkt. # 60, Ex. B, which Plaintiffs  
27 refer to (and provide a web link to) in the SAC. The authenticity of this document is not in  
28 question, and as such, the Court may consider it. *Monper v. Boeing Co.*, 104 F. Supp. 3d 1170,  
1177 (W.D. Wash. 2015).

Amazon in order to avoid suspension or termination. *See* SAC ¶¶ 17, 129, 141.142. The Court finds these allegations, taken as true, plausible on their face. Amazon’s argument that its “Fair Pricing Policy” has procompetitive justifications may be used to rebut Plaintiffs’ claims once a *prima facie* case has been established, but the Court need not consider such rebuttals on a motion to dismiss. *See In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027, 1033 (N.D. Cal. 2008) (holding that while “[a] procompetitive benefit may rebut a *prima facie* case . . . to survive dismissal Plaintiffs are required only to establish a *prima facie* case”).

#### **D. Market Power and Anticompetitive Effects**

Next, Amazon argues that Plaintiffs must allege that each third-party seller has market power and each agreement with a third-party seller is likely to result in an anticompetitive effect and that the SAC fails to do so. Dkt. # 59 at 21. Amazon appears to seek dismissal of all of Plaintiffs’ claims on this basis. Plaintiffs note that Amazon’s motion to dismiss the FAC challenged only the threshold question of Plaintiffs’ definition of the relevant market, and not the potential market power of each third-party seller, and as such, their arguments are untimely under Rule 12(g). Dkt. # 61 at 22; *see also* Dkt. # 18 at 14-18. In any event, Plaintiffs argue, the SAC plausibly alleges a “naked restriction on price or output, such as an agreement not to compete in terms of price,” and this is sufficient. Dkt. # 61 at 22 (quoting *National Football*, 933 F.3d at 1151).

A Section 1 rule of reason claim requires four elements: “Plaintiffs must plead facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.” *National Football*, 933 F.3d at 1151 (quoting *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012)); *see also In re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186, 1191-92 (9th

1 Cir. 2015) (“Vertical agreements...are analyzed under the rule of reason, whereby courts  
 2 examine ‘the facts peculiar to the business, the history of the restraint, and the reasons  
 3 why it was imposed,’ to determine the effect on competition in the relevant product  
 4 market.”) (quoting *Nat’l Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 692  
 5 (1978)).

6 To state a claim for monopolization under Section 2, a plaintiff must prove:  
 7 “(1) [p]ossession of monopoly power in the relevant market; (2) willful acquisition or  
 8 maintenance of that power; and (3) causal antitrust injury.” *Pac. Exp., Inc. v. United*  
 9 *Airlines, Inc.*, 959 F.2d 814, 817 (9th Cir. 1992). To state a claim for an attempt to  
 10 monopolize under Section 2, Plaintiffs must establish the following elements: “(1)  
 11 specific intent to control prices or destroy competition; (2) predatory or anticompetitive  
 12 conduct to accomplish the monopolization; (3) dangerous probability of success; and (4)  
 13 causal antitrust injury.” *Id.* Finally, a Section 2 conspiracy to monopolize claim is proven  
 14 by four elements: “(1) the existence of a combination or conspiracy to monopolize; (2) an  
 15 over act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4)  
 16 causal antitrust injury.” *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158  
 17 (9th Cir. 2003). Plaintiffs also must plead a relevant market to state a claim under  
 18 Section 1 or 2 of the Sherman Act, although they need not be pled with specificity at this  
 19 stage. *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018). Amazon argues that  
 20 Plaintiffs have failed to adequately allege market power and that each alleged conspiracy  
 21 is anticompetitive. In the Ninth Circuit,

22 [m]arket power may be demonstrated through either of two types of proof.  
 23 One type of proof is direct evidence of the injurious exercise of market  
 24 power. If the plaintiff puts forth evidence of restricted output and  
 25 supracompetitive prices, that is direct proof of the injury to competition  
 26 which a competitor with market power may inflict, and thus, of the actual  
 27 exercise of market power. The more common type of proof is circumstantial  
 28 evidence pertaining to the structure of the market. To demonstrate market  
 power circumstantially, a plaintiff must: (1) define the relevant market, (2)  
 show that the defendant owns a dominant share of that market, and (3) show

1 that there are significant barriers to entry and show that existing competitors  
2 lack the capacity to increase their output in the short run.

3 *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)  
4 (internal citations omitted). In *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*  
5 *Inc.*, the Ninth Circuit held that the court may consider “the overall effects of a  
6 defendant’s conduct in the relevant market” and was not “limited to looking at the market  
7 implications of the one contract between the antitrust plaintiff and defendant.” 676 F.2d  
8 1291, 1302 (9th Cir. 1982). The Court finds the principle to be applicable here. Amazon  
9 has not convinced this Court that Plaintiffs are required to allege that each third-party  
10 seller has market power for the specific products it sells. The Court finds that the  
11 allegations of the SAC in regards to the overall effects of Amazon’s conduct in the  
12 market are sustainable on their face. *See* SAC ¶¶ 143-53. Amazon’s motion to dismiss  
13 Plaintiffs’ alternative Section 1 and Section 2 claims is **DENIED**.

#### 14 **E. California Cartwright Act Claim**

15 In addition to their federal antitrust claims, Plaintiffs assert a claim under the  
16 California Cartwright Act, Cal. Bus. & Prof. Code §§ 16700-16770. SAC ¶¶ 276-284.  
17 Previously, this Court dismissed with leave to amend the FAC’s fifth cause of action for  
18 the violation of 38 states’ antitrust and restraint of trade laws. Dkt. # 48 at 22-24; *see also*  
19 FAC ¶¶ 217-225. Amazon seeks dismissal of Plaintiffs’ Cartwright Act claim, arguing  
20 that the reasons for dismissal of their Section 1 claims apply equally to their Cartwright  
21 Act claim. Dkt. # 59 at 23. Amazon argues that the facts before this Court fall under “an  
22 implied exception similar to the one that validates reasonable restraints” under the  
23 Sherman Act, as outlined by the California Supreme Court. *Id.* (citing *In re Cipro Cases I*  
24 *& II*, 61 Cal. 4th 116, 137 (2015)). Plaintiffs counter that because they plead a valid  
25 Sherman Act claim, “they likewise plead a valid Cartwright Act claim.” Dkt. # 61 at 24  
26 (citing *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1114 (N.D. Cal.  
27

1 2012)).

2 To state a claim under the Cartwright Act, a plaintiff must allege: (1) the  
3 formation and operation of the conspiracy, (2) the illegal acts done pursuant thereto, (3) a  
4 purpose to restrain trade, and (4) the damage caused by such acts. *In re California*  
5 *Gasoline Spot Market Antitrust Litig.*, No. 20-cv-03131-JSC, 2022 WL 3215002, at \*1  
6 (N.D. Cal. Aug. 9, 2022). If Plaintiffs plead facts that support an antitrust claim, those  
7 facts may also support a valid California unfair competition claim. *Hicks*, 897 F.3d at  
8 1124, n. 9. Just as Plaintiffs' Section 1 *per se* claim has failed, so to does Plaintiffs'  
9 Cartwright Act *per se* claim. *See Jain Irrigation, Inc. v. Netafirm Irrigation, Inc.*, 386 F.  
10 Supp. 3d 1308, 1316 (E.D. Cal. 2019) ("[B]ecause plaintiffs' Cartwright Act claims rise  
11 or fall depending on the success of its Sherman Act claim, plaintiffs' Cartwright Act  
12 claims must also be dismissed."). Plaintiffs' Cartwright Act claim is **DISMISSED**.

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1 **V. CONCLUSION**

2 For the reasons stated above, Amazon's Motion to Dismiss, Dkt. # 59, is **DENIED**  
3 **in part** and **GRANTED in part**. The Court **GRANTS** Amazon's motion to dismiss  
4 Plaintiffs' Section 1 claim under a *per se* analysis. Leave to amend is not granted, as the  
5 Plaintiffs would have to significantly amend the pleadings against to bring such a claim.  
6 The Court **DENIES** Amazon's motion to dismiss Plaintiffs' alternative Section 1 claim  
7 and Plaintiffs' Section 2 claims. The Court **GRANTS** dismissal of Plaintiffs' Cartwright  
8 Act *per se* claim. The parties shall propose a class certification briefing schedule within  
9 twenty-one (21) days.

10  
11 DATED this 23rd day of March, 2023.

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15 The Honorable Richard A. Jones  
16 United States District Judge  
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